U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 18 December 2006

In the Matter of:
R.D.[1]
Claimant

v. Case No. 2006-BLA-05173

ISLAND CREEK COAL COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:
Andrew Delph, Esq.
For the Claimant

Douglas Smoot, Esq.
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

DENIAL OF MODIFICATION REQUEST

This matter involves a claim for disability benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("the Act"), as implemented by 20 C.F.R. Parts 718 and 725. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who die due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

[1] Effective August 1, 2006, the Department of Labor instituted a policy that decisions and orders in cases under the Black Lung Benefits Act which will be available on this Office's website shall not contain the claimant's name. Instead, the claimant's initials will be used.

PROCEDURAL HISTORY

First Claim

The miner filed an initial claim for benefits on December 23, 1986. (DX56-1) The claim was denied on June 17, 1987. (DX56-23) On July 16, 1987, the Claimant requested a formal hearing. (DX56-26) On December 15, 1988, administrative law judge (ALJ) John Patton issued a Decision and Order granting benefits to the Claimant. (DX 56-50) On January 3, 1988, the Employer appealed the ALJ's Decision and Order granting benefits. On May 16, 1991, the Benefits Review Board (BRB) vacated the ALJ's decision and remanded the case for further consideration consistent with the BRB's ruling. (DX 56-63) On July 30, 1992, ALJ Eric Fiertag issued a Decision and Order on Remand denying benefits. (DX 56-71) The ALJ concluded that the Claimant had failed to establish total disability.

Second Claim

The Claimant filed a subsequent or duplicate claim for benefits on July 5, 1995 (D-1). On November 7, 1995, the District Director issued a notice of initial finding that the Claimant became totally disabled due to pneumoconiosis on July 1, 1995, and was, therefore, entitled to benefits (D-17). Employer contested the Claimant's eligibility and its liability, and submitted medical evidence in support of its position (D-18, 23, 24). The District Director then obtained a consultative opinion from a physician who reviewed the medical evidence and concluded that the Claimant did not have pneumoconiosis or a totally disabling respiratory impairment (D-25). After reviewing this additional evidence, the District Director denied the subsequent claim on March 4, 1996, based on findings that the evidence did not establish the presence of pneumoconiosis, or that pneumoconiosis was caused at least in part by coal mine work, or the existence of a total disability due to pneumoconiosis (D-27, 28). By letter dated April 17, 1996, the Claimant disagreed with the decision and requested a formal hearing (D-35).

On July 23, 1996, the District Director conducted an informal conference with the parties, at which the evidence and issues were discussed, and certain stipulations were made. Following the informal conference, the District Director issued a proposed decision and order on August 7, 1996, recommending that the subsequent claim be dismissed because the evidence did not establish that the Claimant was totally disabled due to pneumoconiosis or that there had been a material change in conditions under §725.309(d) (pre-amended). The proposed decision and order notified the Claimant that it would become final after thirty days unless he appealed by requesting a formal hearing before an Administrative Law Judge. (D-43). Claimant did not timely appeal, but he submitted new medical evidence and requested modification by letter dated July 10, 1997 (D-46,47). On September 16, 1997, the District Director issued a proposed decision and order denying Claimant's request for modification (D-50). The Claimant made a timely request for a formal hearing, and the District Director referred the case to the Office of Administrative Law Judges.

A hearing was scheduled before Administrative Law Judge Daniel F. Sutton on April 1, 1999. (D- 77). On March 29, 1999, the Claimant submitted a request that the case be decided without a hearing on the basis of the documentary record (D-74). Employer appeared at the hearing on April 1, 1999, and stated that it had no objection to Claimant's request (D-77). On August 25, 1999, Judge Sutton issued a decision and order denying Claimant's request for modification of the denial of his subsequent claim. Judge Sutton found that Claimant had established by evidence of reasoned medical opinions the element of total disability, and,

therefore, established a material change of conditions under §725.309(d). However, upon review of the entire evidentiary record, Judge Sutton found that the Claimant was not entitled to benefits because he failed to establish that his total disability was due to pneumoconiosis. (D-82). Claimant did not timely appeal Judge Sutton's decision and order, but, on March 27, 2000, Claimant submitted additional medical evidence along with a request for modification of Judge Sutton's denial of modification of his subsequent claim (D-83).

On March 15, 2002, ALJ Edward Miller issued a Decision and Order denying the request for modification finding that there had been no mistake in fact and that the Claimant had failed to establish a change in conditions. (DX 3-1)

Third Claim

The miner filed a subsequent claim for benefits on September 8, 2003. (DX 4-3) An initial determination awarding benefits to the miner was issued on January 27, 2004. (DX26) Subsequent to the submission of additional evidence, a Proposed Decision and Order denying benefits was issued on July 27, 2004. (DX39) The Claimant requested a modification on April 12, 2005, and also submitted into evidence a medical report by Dr. Rasmussen. (DX44) A Proposed Decision and Order denying benefits was issued July 28, 2005. (DX50) On August 23, 2005, the Claimant submitted a request for a hearing before an administrative law judge (ALJ). (DX52)

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. This claim is governed by the law of the United States Court of Appeals for the Fourth Circuit, because the Claimant was last employed in the coal industry in the Commonwealth of Virginia within the territorial jurisdiction of that court. ***Shupe v. Director, OWCP***, 12 B.L.R. 1-200 (1989) (en banc).

To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director, OWCP***, 9 B.L.R. 1-65 (1986) (en banc). *See* ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director, OWCP***, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The Employer stipulated to at least 10 years of coal mine employment.[2]
2. The Employer agreed in the hearing that the miner has one dependant at the present time pending the completion of divorce proceedings.

[2] TR at 12. (The Employer did not contest the District Director's findings regarding the miner's length of coal mine employment of 10 years.)

I have reviewed all of the evidence in the record and I accept the stipulations as they are consistent with the evidence.

ISSUES

1. Whether the miner suffers from pneumoconiosis.
2. If so, whether pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled.
4. If so, whether the miner's disability is due to pneumoconiosis?
5. Whether this represents a subsequent claim and the evidence establishes a change in an applicable condition of entitlement.
6. Whether the evidence establishes a change in condition and/or a mistake was made in the determination of any fact in the prior denial.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[3] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[4] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[5]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

BACKGROUND

The Claimant is a 50-year-old male who last worked in the coal mines in 1983. (DX3) The Claimant's last coal mine job for at least one year was as a jack wall operator, responsible for occasionally breaking and lifting rock, carrying 50 pound rock dust bent over on knees for 300-400 feet, and shoveling between jacks. The job involved considerable heavy and manual labor. The miner stopped working in the coal mines due to shortness of breath and chest pains. (DX3) The miner is a lifelong non-smoker. As of June 28, 2006, the miner was legally married but in

[3] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[4] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[5] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

the process of obtaining a divorce. [6] (TR at 11) There are no qualifying dependants eligible for augmentation of benefits except the miner's spouse.

MEDICAL EVIDENCE[7]

Chest x-rays

Date of X-Ray	Date of Reading	EXH.	Physician	Interpretation
05/26/04	06/04/04	DX37	**Dr. Castle B-Reader**	FQ1; No evidence of CWP
05/26/04	06/15/04	DX38	**Dr. Wheeler B/BCR**	FQ2; No evidence of CWP
07/25/95	08/08/95	DX110	**Dr. Gaziano B-Reader**	1/0; q/q
11/24/03	11/24/03	DX12	**Dr. Patel B/BCR**	FQ 2; 1/0; s/s

Pulmonary Function Studies

Date	EXH	Physician	HT	AGE	FEV_1	FVC	FEV_1 /FVC	MVV	COOP
11/24/03	DX12	**Dr. Rasmussen**	57	74	B 2.02 A 2.27	B 2.85 A 4.03	B 70% A 56%	------	yes
05/26/04	DX37	**Dr. Castle**	57	74	B 1.77 A 1.91	B 3.33 A 2.85	B 53% A 67%	A 41 B 40	No

Blood-Gas Studies

Date	EXH	Physician	Altitude	Resting(R) Exercise(E)	pCO_2	PO_2	Comments
11/24/03	DX12	**Dr. Rasmussen**	0-2999 ft.	R E	38 39	78 74	----------
05/26/04	DX37	**Dr. Castle**	0-2999 ft.	R	41.6	73.3	----------

[6] TR refers to the transcript of the hearing held on June 28, 2006 in Abingdon, VA before ALJ Daniel Solomon.

[7] The Employer submits several exhibits that exceed the limitations on evidence. These exhibits have been identified and marked for the record, but will not be used in the evaluation of this claim. The Employer contests the application of the amended regulations on the limitations of evidence. The evidence has been marked and identified in the record and the issue is preserved for appeal. Among these are: Deposition of Dr. McSherry (DX4), June 20, 2004 x-ray interpretations by Dr. Spitz and Dr. Myer, November 24, 2003 and May 20, 2004 interpretations by Dr. Scott. Medical report of Dr. Tutuer on April 13, 2006, Dr. McSherry on April 16, 2006, and deposition of Dr. Castle on June 12, 2006.

Medical Reports

Date of Exam	Date of Report	Physician/Facility	EXH.
	06/09/04	**Dr. Castle**	DX37

The Claimant does not suffer from Coal Workers' pneumoconiosis. There are no physical findings indicative of CWP. The x-rays, physiological findings, and the arterial blood-gas studies do not indicate the presence of CWP. The Claimant is permanently and totally disabled to such an extent that he would be unable to perform his usual coal mining employment duties. The Claimant's disability is not due to CWP or any process that has arisen from his coal mining employment duties. His disability is due to an asthmatic process such as bronchial asthma. The Claimant is very likely disabled due to coronary artery disease with angina pectoris and cardiomegaly. Both are conditions of the general public at large and are unrelated to coal mining employment and coal mine dust.

12/06/03	**Dr. Rasmussen**	DX12

There is significant history of exposure to coal mine dust. There are insufficient x-ray changes to justify a diagnosis of coal workers' pneumoconiosis. A clinical diagnosis of CWP cannot be established, however, a diagnosis of coal mine induced chronic lung disease is appropriate. Coal mine dust is capable of causing chronic obstructive lung disease, which includes chronic bronchitis, emphysema and small airways disease of the lung, known as minimal dust induced small airways disease.

07/20/04	**Dr. Rasmussen**	DX44

Ventilatory function studies revealed severe partially reversible obstructive ventilatory impairment. The Claimant does not retain the pulmonary capacity to perform his last regular coal mine job. There is coal mine induced lung disease causing chronic obstructive lung disease. Coal mine dust exposure can cause the abnormalities found in the Claimant or can clearly aggravate any underlying hyperactive airways disease. In either case, Mr. R.D.'s coal mine dust exposure contributes significantly to his disabling lung disease.

06/09/04	**Dr. Castle**	DX47

Several medical records were reviewed including Dr. Rasmussen's dated July 20, 2004. It remains my opinion that Mr. R.D. does not suffer from CWP. However, Mr. R.D. did work in and around the underground coal mines for a sufficient amount of time to have developed coal workers' pneumoconiosis if he were a susceptible host. The additional medical data confirms that his chest x-ray did not show sufficient findings or warrant or justify a diagnosis of CWP. It remains my opinion that Mr. R.D. is permanently and totally disabled as a result of bronchial asthma. He is not permanently and totally disabled as a result of coal workers' pneumoconiosis or as a result of a coal mine dust induced lung disease.

06/14/06	**Dr. McSharry**	EX1

There is not sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. The miner has impairment of pulmonary function on most occasions. This impairment is not attributed to pneumoconiosis but is characterized by variable airflow obstruction with bronchial reactivity and improvement with bronchodilator medication unassociated with a restrictive abnormality and unassociated with impairment of gas exchange either or during exercise. The Claimant is totally and permanently disabled to such an extent that he would be unable to do his regular coal mine work or work requiring similar effort. His disability is not caused in whole or in part by CWP. Should he have a diagnosis of CWP it still would not be contributing to impairment or disability.

Other Evidence

Date of Report	Physician/Facility	EXH.	Type of Report
06/12/06	**Dr. Castle**	EX3	Deposition

After reviewing the Claimant's medical records, social and occupational history, Dr. Castle concluded that there was no evidence of CWP. The x-rays were normal except for indications of cardiomegaly. The Claimant is totally disabled and cannot go back to his previous job. The disability is due to bronchial asthma. Asthma is not caused by dust exposure. There are causes of occupational asthma but coal mine dust is not one of them. There is a non-reversible portion of his impairment sufficient to disable him. When asked whether inhalation of dust exposure aggravates asthma Dr. Castle responded that there may be non-specific irritation in terms of causing a reflex, but it doesn't cause an ongoing worsening of the problem. Dr. Castle stated that he is unaware of any studies that the inflammation of coal mine dust causes asthma, and it can't trigger or make the condition worse.

06/14/06	**Dr. McSharry**	EX4	Deposition

The Claimant has a severe obstructive lung process that is reversible and it is most compatible with asthma or reactive airways disease. The Claimant may have GERD Esophageal reflux disease. CWP is not a reversible disease. Coal mine dust exposure cannot cause asthma. The Claimant has severe airflow obstruction which is partially reversible. It's probably severe enough for him to do his last job. Disability is caused by asthma. The reversibility of the impairment is not such that it goes back to a point where it is non-disabling. On cross-examination, Dr. McSharry conceded that smoke and dust can trigger asthmatic attacks. Coal mine dust can cause obstructive pulmonary impairment. Coal mine dust can cause totally disabling obstructive pulmonary impairment, although it is rare. Coal mine dust can cause totally disabling obstructive impairment absent x-ray evidence, although that is rare also.

Timeliness of Claim

Timeliness is a jurisdictional matter that can not be waived. I have reviewed all of the evidence in the record and find that the claim was timely filed. There is no evidence to the contrary.

REQUEST FOR MODIFICATION ON A SUBSEQUENT CLAIM

If a claim is filed more than a year after the effective date of a final order denying a claim previously filed by the Claimant, then the later claim shall be considered a subsequent claim.[8] The miner filed a third claim on September 8, 2003, more than one year after an ALJ's final order on March 15, 2002, denying benefits. Two Proposed Decision and Orders denying benefits on this latter claim were issued. The Claimant did not submit any response to the most recent Proposed Decision and Order and the Decision and Order became final on August 27, 2004. Within one year of August 27, 2004, the effective date of the Order, the Claimant requested that a hearing be held before an ALJ, thus constituting a request for modification of an order denying benefits on a subsequent claim.

Any party to a proceeding may request modification at any time before one year from the date of the last payment of benefits or at any time before one year after the denial of a claim. 20 C.F.R. § 725.310(a). Upon the showing of a "change in conditions" or a "mistake in a determination of fact," the terms of an award or the decision to deny benefits may be reconsidered. 20 C.F.R. § 725.310. An order issued at the conclusion of a modification proceeding may terminate, continue, reinstate, increase or decrease benefit payments or award benefits.

[8] *See* 20 C.F.R. § 725.309(d)

According to the courts and BRB, the phrase "change in conditions" refers to a change in a claimant's physical condition. *See* ***General Dynamics Corp. v. Director, OWCP***, 673 F.2d 23 (1st Cir. 1982) and ***Lukman v. Director, OWCP***, 11 B.L.R. 1-71 (1988) (Lukman II). Under the regulatory provisions, to determine whether a claimant demonstrates a change in conditions, an administrative law judge ("ALJ") must first conduct an independent assessment of all newly submitted evidence. Then, the ALJ must consider this new evidence in conjunction with all evidence in the official U.S. Department of Labor record to determine if the weight of the evidence is sufficient to establish an element of entitlement which was previously adjudicated against the claimant. ***Kingery v. Hunt Branch Coal Co.***, 19 B.L.R. 1-6 (1994); ***Napier v. Director, OWCP***, 17 B.L.R.1-111 (1993); ***Nataloni v. Director, OWCP***, 17 B.L.R. 1-82 (1993); ***Kovac v. BCNR Mining Corp.***, 14 B.L.R. 1-156 (1990), *aff'd. on reconsideration*, 16 B.L.R. 1- 71 (1992).

The modification process has been further expanded by the United States Supreme Court and federal Courts of Appeals when they considered cases involving the mistake of fact factor listed in the regulations. In ***O'Keefe v. Aerojet-General Shipyards, Inc.*** 404 U.S. 254, 257 (1971), the United States Supreme Court indicated that an ALJ should review all evidence of record to determine if the original decision contained a mistake in a determination of fact. In considering a motion for modification, the ALJ is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See also* ***Jessee v. Director, OWCP***, 5 F.3d 723 (4th Cir.1993); ***Director, OWCP v. Drummond Coal Co.*** (Cornelius), 831 F.2d 240 (11th Cir. 1987).

In his denial of Mr. R.D.'s request for modification, Judge Miller determined that Mr. R.D. could not establish entitlement to benefits because there was no change in condition that established that Mr. R.D. was totally disabled, and the evidentiary record as a whole did not establish that Mr. R.D. was totally disabled due to pneumociosis. Under the change of conditions analysis, I examine the medical evidence presented since the close of the evidentiary record to determine whether Mr. R.D. has become totally disabled due to pneumoconiosis. The prior denial of the subsequent claim became effective on March 15, 2002. This effective date establishes the close of the record.

In modification proceedings, 20 C.F.R. § 725.310(b) expressly defines the evidentiary limitations. The Claimant and Operator can each submit no more than one chest x-ray interpretation, one pulmonary function test, one additional arterial blood-gas study, and one additional medical report as part of the affirmative case, along with such rebuttal evidence as authorized. The Employer has submitted evidence in excess of the limitations. The Employer contests the enforcement of the amended regulations regarding evidentiary limitations. The evidence submitted in excess of the limitations will not be evaluated; however, they have been identified and admitted into the record in order to preserve the issue for possible appeal.

The Employer argues against the application of the evidentiary limitations because the case has never gone to an actual hearing where the parties submitted their initial evidence. However, the regulations do not make a distinction between a decision made by the District Director and a decision by an ALJ subsequent to a formal hearing. The significant factor is the finality of the order as it establishes the timeline from which "new" evidence is evaluated in order to determine if there has been a change in conditions in a request for modification or a change in an applicable condition of entitlement in a subsequent claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Total Disability

To receive black lung disability benefits under the Act, a claimant must have a total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204 (b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204 (b) (1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills. While evaluating evidence regarding total disability, an administrative law judge must be cognizant of the fact that the total disability must be respiratory or pulmonary in nature. In ***Beatty v. Danri Corp. & Triangle Enterprises and Dir., OWCP***, 49 F.3d 993 (3d Cir. 1995), the court stated, in order to establish total disability due to pneumoconiosis, a miner must first prove that he suffers from a respiratory impairment that is totally disabling separate and apart from other non-respiratory conditions.

Mr. R.D. has not presented evidence of cor- pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. As a result, Mr. R.D. must demonstrate total respiratory or pulmonary disability through the pulmonary function tests, arterial blood-gas tests, or medical opinion.

There are two pulmonary function tests submitted for evaluation: one by Dr. Rasmussen and the other by Dr. Castle. Dr. Castle's test is qualifying based on the FEV^1 and FVC values taken during rest. Dr. Rasmussen's pulmonary test is qualifying based on the FEV1/FVC ratio measured during exercise.

The arterial blood-gas tests submitted for evaluation consist of a November 24, 2003 test by Dr. Rasmussen, and a May 26, 2004 test by Dr. Castle. Neither one of the two tests is qualifying.

There are five medical reports submitted for evaluation: two by the Claimant and three by the Employer. In modification requests, each party is entitled to no more than one medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414. *See* 20 C.F.R. § 725.310(b) Pursuant to the regulations, I must enforce the evidentiary limitations on the submission of medical reports. Consequently, I am only going to consider one medical report from each side and one rebuttal report. Because the Claimant has not designated a rebuttal report, I am simply using Dr. Rasmussen's most recent medical report dated July 20, 2004. (DX44) For the Employer, I am evaluating Dr. McSharry's report dated June 14, 2006, and Dr. Castle's April 16, 2006, rebuttal report of Dr. Rasmussen's most recent medical report.

Dr. Rasmussen concluded that the Claimant has severe partially reversible obstructive ventilatory impairment that has been aggravated by coal mine dust. He states that coal mine dust exposure contributes significantly to the Claimant's disabling lung disease. In conducting exercise tests, Dr. Rasmussen diagnosed the Claimant with at least a moderate loss of lung function, sufficient to prevent miner from performing his last coal mine job.

Dr. McSherry concludes that the Claimant has a total disability arising from severe obstructive impairment of the lungs, but that this is not due to coal mine dust exposure. The

cause of the impairment is asthma or asthmatic bronchitis. The Claimant's asthmatic condition is to blame. However, coal mine dust is not the cause because the progressive worsening the airways disease is due to the poor treatment the miner is receiving for his asthmatic condition. The miner would be unable to resume his last coal mine job. Dr. McSherry cannot attribute any of the disability to coal mine dust exposure. As Dr. McSharry asserts, even radiographic evidence of CWP would not alter Dr. McSharry's opinion regarding the cause of the miner's disability.

Dr. Castle, in his June 9, 2004, medical report concluded that the miner had moderate, significantly reversible airway obstruction, probable coronary artery disease, and a history of hypertension. Dr. Castle did conclude that the miner is totally and permanently disabled, but that his disability is not due to coal mine dust exposure. It is due to an asthmatic process. The miner is also very likely disabled due to coronary artery disease and not coal mine dust exposure.

All of the physicians opined that the miner's respiratory impairment rendered him totally disabled and prevented the miner from returning to his last coal mine job. There is considerable disagreement regarding the cause of the Claimant's total disability. Both Dr. Castle and Dr. McSharry had diagnosed the Claimant with an asthmatic condition. In assessing the relative weight of the physicians' opinions, I accord less weight to the opinions of Dr. Castle and Dr. McSharry. Dr. Castle asserts that coal mine dust cannot cause asthma and cannot cause an ongoing worsening of the asthmatic condition; essentially implying that coal mine dust is never an aggravating factor when the miner is not currently employed in the coal mines. His general premise for excluding coal mine dust as a significant contributing factor in asthmatic conditions based on the length of time the Claimant has stopped working in the coal mines is contrary to the regulations and at odds with statutory presumptions. Dr. Castle operates on the presumption that the length of time following the miner's cessation of coal mine employment determines whether pneumoconiosis is significantly related to or substantially aggravated by coal mine dust exposure. I find this reasoning unpersuasive and does not constitute sound analysis. Dr. Castle's premise is contrary to the regulations at 20 C.F.R. § 718.201(a)(2).

In ***LaBelle Processing Co. v. Swarrow***, 72 F.3d 308 (3rd Cir. 1996), the court rejected Employer's reliance on the Surgeon General's Report in support of a finding that coal workers' pneumoconiosis does not progress in the absence of continued exposure. *See also* ***Peabody Coal Co. v. Spese***, 117 F.3d 1001 (7th Cir. 1997) (the Seventh Circuit accepted the Benefits Review Board's rejection of the Surgeon General's report as supportive of the proposition that coal workers' pneumoconiosis does not progress in the absence of continued exposure).

The miner spent a substantial amount of time working in the coal mines; enough to have aggravated or caused his disabling condition. Dr. Castle and Dr. McSharry dispute Dr. Rasmussen's assertion that coal mine dust is implicated as a significant factor in the miner's respiratory ailment, although Dr. McSharry concedes that it is hypothetically possible, however, quite rare. Dr. McSharry conceded, on cross-examination, that coal mine dust can exacerbate an existing asthmatic condition. However, the probability of occurrence is quite low. In dismissing the possibility of coal mine dust as an aggravating factor in the miner's respiratory ailment, Dr. McSharry supports his assertion and conclusions by referring to general probabilities and unsubstantiated theories concerning the relative occurrence of and the causal nexus between obstructive pulmonary impairment and coal mine dust exposure. I find this reasoning unpersuasive. A medical opinion based upon generalities, rather than specifically focusing upon the miner's condition, may be rejected. ***Knizer v. Bethlehem Mines Corp.***, 8 B.L.R. 1-5 (1985). I find Dr. McSharry's explanation as to why the Claimant's significant exposure to coal mine

dust cannot be attributed as a cause or an aggravating factor of his asthmatic condition to be unreasoned and not based on objective evidence. A conclusion, based on a general theory, and unsupported by objective evidence, constitutes an unreasoned medical opinion. Dr McSharry attributes the worsening consdition of the ashthma as related to the non-treatment and ineffective treatment of the asthmatic condition.

The reasoning of both Dr. Castle and Dr. McSharry are unreasoned and merit little probative value. Neither physician addresses Mr. R.D.'s exposure to coal mine dust and his lifestyle as being a non-smoker. Neither Dr. Castle nor Dr. Mcsharry provides persuausive reasons for their diagnoses.

Dr. Rasmussen states that the miner has had significant exposure to coal mine dust. Dr. Rasmussen concludes that individuals with hyperactive airways disease, similar to the Claimant, are at a significantly increased susceptibility to the effects of coal mine dust.
Therefore, Dr. Rasmussen's concludes, the Claimant's total disability is due to coal mine dust exposure. Coal mine dust is a significant factor in aggravating the asthmatic condition of the miner.

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. ***Fields v. Island Creek Coal Co.***, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. ***Hoffman v. B&G Construction Co.***, 8 B.L.R. 1-65 (1985). There is ample use of objective evidence in Dr. Rasmussen's medical report to classify his finding of total disability as a reasoned, and adequately documented opinion. However, on the issue of causation, Dr. Rasmussen's conclusion is not as equally documented and based on a reasoned opinion. A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. ***Fields****, supra*. Dr. Rasmussen's assertion that the Claimant's airways disease produces susceptibility to coal mine dust and, therefore, coal mine dust contributes significantly to the Claimant's total disability constitutes cause and effect rationale that is based on a presumption and not supported by sufficient facts, clinical findings, or other objective data. Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. ***Clark v. Karst-Robbins Coal Co.***, 12 B.L.R. 1-149 (1989)(en banc). I find Dr. Rasmussen's causation analysis not to be well reasoned and accord it little value on the issue of causation.

I find that the Claimant has failed to establish a change in condition since the prior denial of this claim.

MISTAKE OF FACT DETERMINATION

The Board holds that, in any case involving a modification petition, the fact-finder should review the claim for a "mistake in a determination of fact," regardless of whether a mistake is specifically alleged. ***Kingery v. Hunt Branch Coal Co.***, 19 B.L.R. 1-6 (1994); ***Jessee v. Director, OWCP***, 5 F.3d 723 (4th Cir. 1993); *See also* 20 C.F.R. §725.310(c) (2001). The amended regulations at 20 C.F.R. §725.310(c) (2001) provide that "[i]n any case forwarded for hearing, the administrative law judge assigned to hear such case shall consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. §725.310(c) (2001).

The United States Supreme Court, in ***O'Keefe v. Aerojet-General Shipyards, Inc.***, 404 U.S. 254, 257 (1971), has indicated that all evidence of record should be reviewed in determining whether "a mistake in a determination of fact" has made and stated that, under modification, the fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See also* ***Jessee v. Director,*** *supra*; ***Kovac v. BCNR Mining Corp.***, 14 B.L.R. 1-156 (1990), *aff'd on recon.,* 16 B.L.R. 1-71 (1992). ; ***Director, OWCP v. Drummond Coal Co. (Cornelius)***, 831 F.2d 240 (11th Cir. 1987).

Reviewing the new evidence in conjunction with the existing evidence in the record, I see no basis for finding a mistake in a determination of fact. The Claimant had successfully established that he suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he was totally disabled. However, there was insufficient evidence to conclude that the total disability was due to pneumoconiosis. The new evidence submitted is generally consistent with evidence previously submitted in the record and considered in prior decisions. The evidentiary record is consistent with prior decisions concerning the failure by the Claimant that his total disability is due to pneumoconiosis. Although Dr. Rasmussen determined that coal mine dust is capable of causing chronic obstructive lung disease, which includes chronic bronchitis, emphysema and small airways disease of the lung, known as minimal dust induced small airways disease, he did not relate it to this claimant and to this fact pattern. A review of the evidence in the record and conclusions that were based on this record reveal no mistake in a determination of fact. The Claimant has not established any basis that would allow me to grant his request for modification or to grant an award of Black lung benefits.

ORDER

It is hereby **ORDERED** that the claim of **R.D**. is **DENIED**

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision